Supreme Court, U.S.
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87-1909
No. .....

In The
Supreme Court of the United States
October Term, 1987

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LAWRENCE F. HOULTON,
Petitioner,
vs.
STATE OF NEBRASKA,
Respondent.

———o———

On Writ of Certiorari to the Supreme Court of the State of Nebraska

———o———

PETITION FOR WRIT OF CERTIORARI

———o———

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12 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Douglas County District Court and Supreme Court of Nebraska erred in not granting suppression of the evidence obtained against the Defendant when said evidence was the fruit of an illegal arrest under R.R.S. Section 29-402 (1979).

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IN THE SUPREME COURT
OF THE UNITED STATES

LAWRENCE F. HOULTON,	)	
	)	
Petitioner,	)	CASE NO.:
	)	
vs.	)	PETITION FOR
	)	WRIT OF
STATE OF NEBRASKA,	)	CERTIORARI
	)	
Respondent.	)	

TO: The Supreme Court for the United States:

Petitioner, LAWRENCE F. HOULTON, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Nebraska entered December 18, 1987. Opinion below:

The Supreme Court for the State of Nebraska entered its opinion affirming the conviction of the Petitioner, for the offense of operating a motor vehicle while under the influence of alcohol, second offense. A copy of the opinion is attached to as Appendix A.

The Court denied the Petitioner's Motion for Re-hearing on February 24, 1988. Jurisdiction of this Court is under Title 28, United States Code, Section 1254(1) and Constitutional provision involved United States Constitution Fourth Amendment.

———o———

STATEMENT OF THE CASE

On December 18, 1987, the Supreme Court for the State of Nebraska affirmed the conviction of Lawrence

F. Houlton for violation of Nebraska Revised Statutes Section 39-669.07. *State of Nebraska vs. Houlton*, 227 Neb. 215 (1987). A timely Petition for Re-hearing pursuant to Rule 17 of the Nebraska Rules of Procedure was filed December 22, 1987, and the Petition was denied on February 24, 1988 by the Nebraska Supreme Court.

This Petition follows:

REASON FOR GRANTING THE WRIT

This case involves the Fourth Amendment Rights of the Petitioner in a situation wherein the Petitioner was arrested by a citizen, contrary to the statutes of the State of Nebraska.

In *Berkemer vs. McCarty*, 468 U.S. 420 (1984), this court held safeguards of *Miranda* apply to custodial interrogations regardless of the nature or the severity of the offense of which the person is suspected or for which he is arrested. The court held that *Miranda* warnings must be given even if the crime suspected is a misdemeanor traffic offense such as driving under the influence of alcohol.

In *United States vs. Wong Sun*, 371 U.S. 471 (1963), this court held that the ultimate question determining whether or not evidence should be suppressed as "fruit of the poisonous tree" is whether the evidence sought to be introduced was derived from the exploitation of a primary illegal act or by means sufficiently distinguished to be purged of the primary taint.

The primary purpose of the exclusionary rule is not to redress a wrong but to discourage official misconduct.

Terry vs. Ohio, 392 U.S. 1 (1968).

Weeks vs. United States, 232 U.S. 383 (1914).

In cases involving civilian action the test is, in light of all the circumstances of the case, must the citizen be regarded as having acted as an instrument or agent of the state. *Coolidge vs. New Hampshire*, 403 U.S. 443 (1971).

CONCLUSION

For the foregoing reasons, Petitioner, LAWRENCE F. HOULTON, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska.

Respectfully submitted,

/s/ Anthony S. Troia
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DATED: April 19, 1988

APPENDIX

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,

v.

Lawrence F. Houlton, Appellant.

Case Caption

State v. Houlton

Filed December 18, 1987. No. 87-340.

Appeal from the District Court for Douglas County: John E. Clark, Judge. Affirmed.

Anthony S. Troia, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

STATE V. HOULTON

NO. 87-340—filed December 18, 1987.

Evidence: Arrests. The rule rendering evidence derived either directly or indirectly from unlawful sources inadmissible does not apply to evidence obtained in a citizen's arrest unless such arrest was part of action taken by the State.

Boslaugh, Caporale, and Shanahan, JJ., and Rowlands, D.J., and Colwell, D.J., Retired.

CAPORALE, J.

Defendant, Lawrence F. Houlton, appeals his conviction for second offense drunk driving and assigns as his

sole error the failure of the trial court to suppress the evidence against him. We affirm.

On August 28, 1986, Kenneth Toms, an Iowa state trooper, was off duty and in Omaha on personal business. At about 1 p.m., he was driving his own automobile northward on 114th Street and saw Houlton driving southward toward Pacific Street. Houlton was slumped forward over the steering wheel of his automobile and was swerving on and off the shoulder.

Toms, who was wearing civilian clothing, turned his automobile around and drew up to Houlton's automobile, which was stopped at a traffic light. Toms got out of his vehicle, approached Houlton, and asked Houlton if he had been drinking. Houlton replied that he had. Toms then told Houlton that he was under citizen's arrest. Houlton turned his keys over to Toms as the latter requested. As Houlton left his automobile, he began to walk away, but Toms stopped him and had him wait while Toms moved both vehicles out of the traffic. Toms noted that Houlton exhibited all the characteristics of a person under the influence of alcohol: bloodshot eyes, slurred speech, odorous breath, and poor balance and dexterity. Toms asked a witness to call the Omaha police.

After Toms described what had occurred, the Omaha officers arrested Houlton. Houlton failed an Alco-Sensor test which was administered by the police at the scene, and later tested at .298 on the Intoxilyzer.

Apparently recognizing that the evidence developed by Toms, combined with that developed by the police, if properly admitted, is sufficient to support his conviction, Houlton contends that all the evidence should have been

suppressed because his initial arrest by Toms was unlawful. Neb. Rev. Stat. § 29-402 (Reissue 1985) provides: "Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained." Driving while intoxicated is neither a felony nor a petit larceny; it is a Class W misdemeanor. Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). Thus, if Toms' actions constitution an arrest of Houlton, a matter we do not decide but assume to be so for the purpose of our analysis, it was an unlawful arrest.

The question thus becomes whether the evidence obtained as the result of Toms' unlawful citizen's arrest must be suppressed. In so arguing, Houlton notes that *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), declares inadmissible evidence directly or indirectly derived from an unlawful arrest. It must be understood, however, that the rule rendering evidence derived from unlawful sources inadmissible is designed to discourage lawless police conduct, *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and to discourage governmental officials from participating in or encouraging conduct which would be illegal if performed by the government. *Gundlach v. Janing,* 401 F.Supp. 1089 (D. Neb. 1975). It is not, however, a part of the "policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge v. New Hampshire,* 403 U.S. 443, 488, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Thus, it has been held that the exclusionary rule does not apply to citizens' arrests, *Com. v. Corley,* 507 Pa. 540, 491 A.2d 829 (1985); *State v. Clark,* 454 So.2d 232 (La. App. 1984); *State v. Polk,* 482 So.2d 21 (La. App. 1986), unless such an arrest was a part of the action taken by the State. *People v. Zelinski,* 24 Cal.2d 357, 594 P.2d 1000, 155 Cal.Rptr. 575 (1979); *People v. Martin,* 225 Cal.App.2d 91, 36 Cal.Rptr. 924 (1964); *Thacker v. Commonwealth,* 310 Ky. 702, 221 S.W.2d 682 (1949). Indeed, this court, in *State v. Bodtke,* 219 Neb. 504, 363 N.W.2d 917 (1985), held that an incriminating statement made by the defendant to his employer's representatives was admissible notwithstanding the fact that the defendant had not been given the *Miranda* warnings. See, also, *State ex rel. NSBA v. Douglas, ante* p. 1, — N.W.2d — (1987).

Defendant refers us, however, to *State v. Goff,* 174 Neb. 548, 118 N.W.2d 625 (1962), wherein we held that evidence obtained by an Iowa officer purporting to act under the arrest authority granted by Neb. Rev. Stat. § 29-416 (Reissue 1985) to foreign officers in fresh pursuit of one thought to have committed a felony and entering this state should have been excluded. In so ruling, we reasoned that as no fresh pursuit had been involved, § 29-416 did not apply, and, thus, the arrest incident to which the search resulting in the seizure had been made was unlawful. The situation in the case presently before us is distinguishable. In *Goff,* it was an Iowa police officer acting in the scope and course of his duties as such who effected the initial arrest and obtained the evidence. Thus, the acts of the Iowa officer were the acts of a State. In this case no State action was involved in the arrest by

Toms; he was an off-duty police officer acting as a private citizen. Toms as a citizen then told the police what he saw, and the police, acting on the probable cause provided by the citizen's description, then developed additional cumulative evidence.

Under the circumstances, all the evidence was properly admitted; accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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05-34-22

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Lincoln, NE 68509 2-24-88

In case of STATE V. HOULTON, NO. 87-340, the following orders have been made:

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE
SUPREME COURT